No. 74-1453

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NEWSPAPER AND PERIODICAL Drivers & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 509 F.2d 99. Its earlier decision in the same case, *sub nom. Brown* v. *National Labor Relations Board*, is reported at 462 F.2d 699.[1] The Board's supplemental decision and order (Pet. App. 10-20) are reported at 204 NLRB 440. The Board's initial decision and order are reported at 194 NLRB 37.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4-9) was entered on February 18, 1975. The petition for a writ of certiorari was filed on May 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]This Court denied certiorari, *sub nom. San Francisco Newspaper Printing Co.* v. *National Labor Relations Board*, 409 U.S. 1008.

QUESTION PRESENTED

Whether the Board properly found that an agreement between the company and the union requiring independent contractors to become employee-union members as a condition of continuing their dealerships with the company was designed not to protect the work of the bargaining unit represented by the union, but rather to increase union membership, in violation of Section 8(e) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set out in the petition at pp. 2-3.

STATEMENT

The San Francisco Newspaper Printing Company (the Company) was established in 1965 by Hearst Publications and the Chronicle Publishing Co., to perform the mechanical and business functions for publication of their two Bay area newspapers (194 NLRB 37, 39). Newspaper and Periodical Drivers and Helpers Union, Local 921, IBT (the Union) has represented, since 1937, some categories of the Company's, and its predecessors', circulation employees (*ibid.*).

Circulation of the Company's papers within the city is handled by employees who are represented by the Union. Circulation in suburban areas is accomplished partly by employees represented by the Union and partly by dealers[2] who are not and never have been represented by the Union. (194 NLRB at 39, 41.)

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[2]The court of appeals, in its initial decision, found these dealers to be independent contractors. 462 F.2d 699, 706.

Over the years, the Union, which claims geographical jurisdiction within a 50-mile radius of San Francisco, has sought to expand the boundaries of its bargaining unit and has had limited successes (Pet. App. 12-13). Initially, the Union tried to organize the dealers, but, when that effort failed, the Union's president testified that it "decided to do it by contract, by collective bargaining" (Pet. App. 15). In March 1968, the Company and the Union executed a supplement to their existing collective bargaining agreement which provided that, on various dates between April 1, 1968 and July 1, 1972, the dealers would be terminated and the bargaining agreement would be extended to cover the distribution of newspapers in the localities then served by the dealers (Pet. App. 2, 21-22). This "Supplemental Agreement," affecting 37 dealers, added that (Pet. App. 22):

> (2) The dealer in any one or all of the above designated cities whose contract is terminated in accordance with the above terms shall, at the Employer's option, be permitted to continue in that same territory as an employee working under Union jurisdiction and so long as he remains continuously employed in the same territory shall not be subject to replacement in accordance with the seniority provisions of Section 26 but in all other respects shall be subject to the terms of this Agreement.

Thereafter, pursuant to this provision, whenever a dealership was terminated and the dealer was permitted to remain, he was absorbed into the collective bargaining unit. He was responsible for delivery as before but was required to become and remain a member of the Union under the union-security provisions of the collective bargaining contract. (194 NLRB at 41.)

Upon the termination of their dealerships, several dealers filed unfair labor practice charges with the Board alleging that the "Supplemental Agreement" violated Section 8(e) of the Act. In its initial decision, the Board, finding that the dealers were employees of the Company rather than independent contractors, dismissed the unfair labor practice complaint, 194 NLRB 37. On review, the court below found that the dealers were independent contractors and remanded the case to the Board for a determination of whether a violation of Section 8(e) had occurred, 462 F.2d 699.

On remand, the Board found that the provision in the Company-Union collective bargaining agreement which required termination of the dealer contracts with the Company was aimed principally at the non-union status of the dealers rather than at protection of the unit employees' work opportunities, and therefore was secondary and unlawful under Section 8(e) of the Act (Pet. App. 15). The Board stated (Pet. App. 14-15):

> In our view, * * * the work preservation aspect of the contract terminations under attack here is incidental to the cessation of doing business instead of the other way around. Respondents assert that placing the work of the dealers under the substantive provisions of the collective-bargaining agreement will create more jobs. But the agreement does not require that the work of the dealers be given to employees from the preexisting unit. It permits retention of the former independent dealers to continue distributing newspapers and it is reasonable to expect that many of the dealers would be so retained. Thus, no substantial work opportunities would necessarily be added for employees from the preexisting unit, but rather there would be new employees who must become union members. Furthermore, the unit would be expanded to cover geographical areas never within the unit, where any increase in the amount of work done by the independent dealers would not in itself cause any decrease in the amount of work available to unit employees. No claim is made here that changing dealers into unit employees is necessary to preserve union standards within the unit or to discourage contracting of unit work. [Footnotes omitted.][3]

The Board ordered both the Union and the Company to cease and desist from effectuation of the agreement, ordered the Company to offer to reinstate the dealership contracts of all dealers terminated within six months of the filing of the charges, and ordered both Company and Union to post appropriate notices (Pet. App. 16-17).

The court of appeals found "substantial evidence * * * to support the Board's findings that the Union and the Company violated §8(e) of [the Act]," and enforced its order (Pet. App. 2). The court stated (*ibid.*):

> The Board correctly found that "work preservation" was not the primary object of the contract termination provision, and in so doing it properly applied the rule of *National Woodwork Manufacturers Assoc.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

ARGUMENT

In *National Woodwork Manufacturers Assoc.* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that whether an agreement restricting business relations between two persons violates Section 8(e) of the National Labor Relations Act turns on "whether, under all

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[3]The Board also noted that "the Union's president admitted that, after failing in attempts to organize the dealers, the Union 'decided to do it by contract, by collective bargaining'" (Pet. App. 15).

the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere [footnote omitted]." If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. Agreements which require "that specific work be done by members of the bargaining unit" or only in accordance with "union work standards" are primary; but those which restrict work opportunities to union members are secondary. *Local 814, Teamsters* v. *National Labor Relations Board*, 512 F.2d 564, 566 (C.A.D.C.), and cases cited therein. See also *National Labor Relations Board* v. *National Maritime Union*, 486 F.2d 907 (C.A. 2), certiorari denied, May 12, 1975 (No. 74-1102).

The only question presented by the petition is whether the Board properly concluded that the principal thrust of the agreement here was to expand the Union's membership rather than to preserve work opportunities for the unit employees. Such an issue, involving only the application of settled principles to the particular facts of this case, does not warrant review by this Court. In any event, the circumstances outlined by the Board (*supra*, pp. 4-5) fully support its conclusion here.[4]

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[4] *Meat & Highway Drivers, Local 710* v. *National Labor Relations Board*, 335 F.2d 709 (C.A.D.C.), on which petitioner relies (Pet. 12), is not to the contrary. There the union sought, principally, to expand the work opportunities of the bargaining unit in a situation of shrinking job opportunity (335 F.2d at 714). To the extent that the union also sought to increase its membership rather than to preserve work opportunities for the bargaining unit, its conduct was found violative of Section 8(e) (*id.* at 717).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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